UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	14 CV 2502	
KATHERINE HEIGL,	1	
Plaintiff,	Civ	
V.	DECEIVE	1
DUANE READE, INC.,	COMPLAINT APR 0 9 2014	
JUDGE RAMOSefendant.	JURY TRIAL DEMANDED U.S.D.C. S.D. N.Y.	

Plaintiff Katherine Heigl, by her attorneys Ballard Spahr LLP, for her complaint in this action against Defendant Duane Reade, Inc., alleges as follows:

NATURE OF THE ACTION

- I. The actress Katherine Heigl, who has starred in the television series Grey's Anatomy and in films including 27 Dresses and The Ugly Truth, was recently photographed without her consent by paparazzi in New York City leaving a Duane Reade pharmacy. Duane Reade then misused and misappropriated the photograph for its own commercial advertising, distributing the photo with Duane Reade's own promotional slogans on its Twitter and Facebook accounts, all without Ms. Heigl's knowledge or approval. Duane Reade has ignored a written demand that it stop this unlawful activity, and brazenly continues to exploit Ms. Heigl's image for commercial gain, despite her strenuous objection.
- 2. For its continuing willful violation of the law, Duane Reade is liable for not less than \$6 million in compensatory and punitive or treble damages. While the harm to Ms. Heigl is substantial, she intends to donate all monies recovered in this lawsuit to a charitable foundation, the Jason Debus Heigl Foundation. The Foundation focuses on animal welfare through animal relocation, humane education, grant giving, and training for companion animals.

3. Duane Reade's actions make it liable for (i) violation of the Lanham Act, 15 U.S.C. § 1051 *et seq.*; (ii) violation of Plaintiff's right of privacy and publicity under Sections 50 and 51 of the New York Civil Rights Law; and (iii) unfair competition under New York law. Each of these claims arises from Duane Reade's unauthorized use, done knowingly and willfully, of Ms. Heigl's name, picture, image, and likeness for commercial advertising and other trade purposes within New York State and elsewhere.

THE PARTIES

- 4. As set forth further below, Plaintiff Katherine Heigl ("Plaintiff") is a major motion picture and television actress, celebrity, producer and philanthropist, whose persona has substantial financial and other value. She is a citizen of the State of Utah.
- 5. Defendant Duane Reade, Inc. ("Defendant" or "Duane Reade") is a Delaware corporation with its principal place of business in New York City at 40 Wall Street, New York, New York 10005. On information and belief, Defendant is a leading retail pharmacy chain in New York State and the New York City tri-state area in terms of number of locations, customer base, and amount of revenue. Defendant heavily advertises itself, its products and its services widely in all media, including via the Internet and social media, using, for example, Facebook and Twitter to reach millions of customers.

JURISDICTION AND VENUE

6. The Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 (actions arising under the Federal Trademark Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. §1338 (civil action arising under statutory trademark law and related unfair competition claims), and under 28 U.S.C. § 1332(a) (diversity) because the amount in controversy exceeds \$75,000 (exclusive of interest and costs) and the dispute is between citizens

of different states. Jurisdiction exists over the state law claims pursuant to 28 U.S.C. § 1367(a) (supplemental jurisdiction).

- 7. This Court has jurisdiction over Defendant because Defendant is, and at all times relevant to this action has been, doing business in the State of New York, having continuous and systematic business contacts with New York carried out with a fair measure of permanence and continuity here. In particular, Defendant's business headquarters and principal place of business are located in New York City, and Defendant is registered with the New York Department of State, Division of Corporations, to do business in New York State.
- 8. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b) and (c) because Defendant resides in this District, being subject to personal jurisdiction here, and because a substantial part of the events giving rise to Plaintiff's claims in this action occurred in this District.

FACTS

Katherine Heigl's Creation, Use and Promotion of Her Valuable Professional Persona

9. Plaintiff is a highly successful television and motion picture actress, producer and celebrity. She has starred in the major motion pictures 27 Dresses, The Ugly Truth, Knocked Up, Life As We Know It, and New Year's Eve, among others. According to the film industry web-site www.boxofficemojo.com, Plaintiff's films have grossed over one billion dollars worldwide. Plaintiff also has appeared in numerous television programs and series, starring in the highly successful long-running television series, Grey's Anatomy, for which Plaintiff received a Primetime Emmy Award for Outstanding Supporting Actress in a Drama Series for her role as the character Dr. Izzie Stevens. Plaintiff was a member of the Grey's Anatomy cast that received the Screen Actors Guild Award for Outstanding Performance by an

Ensemble in a Drama Series, and has twice been nominated for a Golden Globe Award. Plaintiff recently completed filming three motion pictures that will be released in 2014 and 2015 and has been in New York City during the period her likeness was misappropriated by Defendant while starring in a one-hour pilot for NBC. Plaintiff continues to be in high demand in the entertainment industry.

- 10. In addition to her celebrity in the entertainment world, Plaintiff is a founder of, and grants selected use of her name and likeness to, the non-profit Jason Debus Heigl Foundation (the "Foundation"). The Foundation maintains a website at www.jasonheiglfoundation.org.
- 11. As a consequence of her work in the entertainment and philanthropic worlds, Plaintiff is a highly recognized celebrity. Plaintiff maintains a Twitter account with over 754,000 followers (@KatieHeigl). A recent search for "Katherine Heigl" on the Google search engine returned over 3.2 million results.
- 12. Plaintiff's picture, image and likeness enjoy wide-spread recognition and monetary value. To prevent any diminution of that value, Plaintiff has carefully and deliberately protected her valuable professional name, picture, image, likeness, and persona -- that is, her legally-recognized right of privacy and publicity -- from exploitation through unauthorized commercial advertising. Accordingly, when Plaintiff chooses to endorse a product or service, she is highly selective and well compensated.
- 13. Furthermore, in connection with the Foundation, Plaintiff carefully authorizes and controls the use of her name, picture, image and likeness for charitable fundraising purposes and other activities of the Foundation.

14. Plaintiff was never approached by and did not authorize Defendant to license or use Plaintiff's name, picture or image for any purpose, including commercial advertising, sponsorship or endorsement.

Duane Reade's Use of Social Media For Its Advertising in New York and Elsewhere

- 15. Duane Reade engages in commercial advertising of its company, goods, and services using social media sites, including Facebook, Twitter, Pinterest, and others.
- Defendant's Twitter account can be found at www.twitter.com, with the user name @DuaneReade. A printout of its Twitter home page created on March 31, 2014 is attached hereto as Exhibit A. It is 36 pages and includes Defendant's commercial advertising postings ("Tweets") going back to March 14, 2014. Defendant's Twitter account has 2.02 million followers, and states in the identification headline that "Duane Reade is the largest and most recognized drugstore chain in the New York Metropolitan area serving customers since 1960." As of April 1, 2014, Defendant has tweeted advertising messages to its two-million-plus followers over 19,900 times. (Ex. A, p. 1).
- 17. Defendant links its Internet and social media sites to maximize the commercial advertising impact of Defendant's Internet marketing program. Defendant's Twitter account includes a link to Defendant's Facebook account, found at facebook.com/duanereade. Defendant's home page on the Internet, found at www.duanereade.com, includes prominent graphical links to Facebook, Twitter, Pinterest, and other sites under the banner headline "Get Social with Duane Reade."
- 18. The purpose of Defendant's social media activities is commercial advertising aimed at attracting customers and revenue, especially social media savvy customers

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in the coveted young adult demographics. As a finalist for an advertising industry "Shorty Award" (http://industry.shortyawards.com), Duane Reade boasted that its online "Get Social with Duane Reade" campaign is intended to "drive awareness, engagement and increase sales at all retail stores using digital marketing strategies," and that its social media presence "[a]chieved 4 billion+ impressions across the social web. This is huge especially for a regional drugstore chain. To achieve the same number of impressions in USA Today, an ad spend of 2,249 full-page ads priced at over \$467 Million would be necessary." Duane Reade also boasts that "DR is now the most widely followed drugstore in the world, dominating the social media landscape and stealing the voice from their national competitors."

- 19. Defendant's Tweets predominantly promote commercial advertisements for a wide range of its products and services. For example, on March 14, 2014, Defendant tweeted "Crunch, crunch Munch! It's National Potato Chip Day! Enjoy!" followed by a link to an advertisement for Defendant's own "DeLish" label food product. (Ex. A, p. 35). In another representative commercial advertisement Tweet on March 17, 2014, Defendant tweeted "Experience the best of beauty from around the world at #DuaneReade LOOK Boutique March 17-21 See flyer for info," with a link to an advertisement for beauty products. (Ex. A, p. 31).
- 20. Defendant's Twitter page typically relies on short text tweets, followed by hyperlinks to full page photographic advertisements for products and services. Defendant's calculated social media advertising methods only occasionally use large photographs immediately visible along with a tweet to make an extra impression upon consumers. Such photos typically include pictures of Defendant's products accompanied by links to product ads, such as Duane Reade food products (Ex. A, pp. 17, 19, 20), other products sold by Duane Reade (Ex. A, p. 27), and Duane Reade store premises (Ex. A, p. 22).

Defendant's Actions in Violation of Plaintiff's Valuable Rights

- 21. On or about March 18, 2014, Defendant posted a Tweet accompanied by a large and prominently displayed photograph of Plaintiff, stating "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore." (Ex. A, p. 25-26).
- 22. Clicking on the Plaintiff's featured photograph in the March 18, 2014 Tweet automatically expands to a full size photograph of Plaintiff, with the same Tweet text, attached hereto as Exhibit B (the "Heigl Photograph").
- Defendant's Facebook page, under the "Photo Album" section with the heading "Duane Reade's Photos Duane Reade's Page." The Facebook posting included a new and revised text, making it clear that @KatieHeigl was indeed the famous actress Katherine Heigl, and highlighting that Defendant's false advertising message -- that Plaintiff endorses Duane Reade -- was the sole reason for Duane Reade to prominently feature the photograph. Capitalizing on their original unauthorized Tweet to maximum advantage on their Facebook page, Defendant changed "favorite drugstore" to "most convenient drugstore" to drive home the commercial message: "Don't you just love a quick #DuaneReade run? Even Katherine Heigl can't resist shopping at #NYC's most convenient drugstore!" Copies of the Facebook text and Heigl Photograph posting are attached hereto as Exhibit C.
- 24. The Heigl Photograph is a typical "Paparazzi" shot, depicting Plaintiff walking on the street in New York City, in a private moment looking away from the camera, apparently exiting a Duane Reade location and carrying Duane Reade shopping bags. The photograph posted on the Twitter home page shows Plaintiff from the waist up. The Heigl Photograph accessed via links on Twitter and Facebook shows a full length image of Plaintiff.

- 25. The Heigl Photograph's lower right corner includes a logo "Just Jared," and the Facebook posting (Ex. C) references the source of the Heigl Photograph to the website "Just Jared," as follows: "Image via: justjared.com/photo-gallery/3073133/katherine-heigl-signs-with-wmeleaves-caa/02."
- 26. On information and belief, Just Jared is a celebrity news website specializing in so-called Paparazzi photographs of celebrities in candid moments. The website www.justjared.com includes the Heigl Photograph, and several others taken the same moment (including a photo of Nancy Heigl), as part of a news story dated March 17, 2014, entitled "Katherine Heigl Signs With WME After Leaving Creative Artists Agency." A copy of the Just Jared news article and photographs is attached hereto as Exhibit D. Clicking on the Just Jared photos leads to a full size version of the Heigl Photograph, attached hereto as Exhibit E.
- 27. On information and belief, Defendant obtained a Paparazzi photograph originally published by Just Jared as part of Just Jared's news reporting on Katherine Heigl's career, and Defendant misappropriated and purloined the photograph for use completely unrelated to its original news context, by stripping the photo of its original editorial context. Defendant's actions involved multiple uses on multiple Internet websites, and constituted an unauthorized publication for commercial advertisement and "endorsement" by Plaintiff of Duane Reade.
- 28. Duane Reade's Facebook page "Photo Album" link directs viewers to a collection of photographs that include product and merchandise depictions. This page featured Plaintiff, very prominently, as the only celebrity among product and other photos. This use and depiction was calculated to attract consumers to the Duane Reade brand by falsely implying that

Plaintiff endorses Defendant. A copy of Defendant's Facebook Photo Album page showing this prominent use of Plaintiff's image is attached hereto as <u>Exhibit F</u>.

- 29. On information and belief, Duane Reade's Twitter account normally includes only occasional Duane Reade products or store premises photographs displayed as the user scrolls through the Tweet postings. But among recent photographs, Plaintiff's image stands out as the only celebrity image, thereby designed to exploit Plaintiff's image to suggest false cachet for Defendant's Twitter page and imply falsely that Plaintiff endorses Defendant. On information and belief, Defendant has singled out Plaintiff simply because she happened to be a customer on one occasion at a Duane Reade store, and a photograph of that occasion happened to be included in reporting on entertainment-industry news.
- 30. Use of Plaintiff's image under these circumstances improperly exploited Plaintiff's name and likeness, as a celebrity, for Defendant's commercial advertising and purposes of trade, without authorization. Such use was done knowingly and willfully, as evidenced by Defendant's manipulation of and changes to the Duane Reade advertising messages in the captions, after Defendant had intentionally stripped out all evidence of the original news context to the Heigl Photograph.
- 31. Indeed, Duane Reade's infringing and illegal acts required multiple, discrete steps, including, on information and belief, (i) purloining and misappropriating the Heigl Photograph from the Just Jared entertainment news web-site; (ii) eliminating all news reporting aspects of the original posting; (iii) then posting the Heigl Photograph on Twitter with a text advertisement for Defendant, including a link to the full size Heigl Photograph; and (iv) finally, posting the Heigl Photograph on Facebook on Defendant's Photo Album with a revised and

improved advertising message, and again omitting any news reporting aspects of the original use of the photograph of Plaintiff.

- 32. Defendant's actions were at all times intentional and knowing and in bad faith. At no time did Defendant seek or obtain any authorization from Plaintiff for Defendant's use of the Heigl Photograph. Defendant has improperly sought to transform news photography into unauthorized commercial advertising and endorsements for its own benefit.
- 33. On or about March 19, 2014, Plaintiff's counsel sent a cease and desist letter to Defendant, demanding that Defendant cease its illegal acts and respond immediately. Defendant ignored Plaintiff's demands.

FIRST CLAIM (Section 43(a) of the Lanham Act)

- 34. Plaintiff repeats, realleges, and incorporates by reference the allegations of paragraphs 1 through 33 above as if fully set forth herein.
- 35. Defendant has in commerce made a false or misleading representation of fact in connection with goods or services that is likely to cause consumer confusion as to the origin, sponsorship, or approval of the goods or services.
- 36. Defendant's commercial advertising campaigns on the Internet and in social media are aimed and occur across state lines in the New York metropolitan area, including New York, New Jersey, Connecticut, and via the Internet to all fifty states and internationally.
- 37. Plaintiff has not authorized Defendant to use her valuable name, picture, image, or likeness.
- 38. Defendant's use of Plaintiff's name, picture, image, and likeness falsely implies that Plaintiff sponsors, endorses, or is affiliated with Defendant's goods and services and

is likely to cause consumer confusion, and therefore constitutes false advertising and unfair competition.

- 39. Defendant's acts have been willful, knowing, deliberate, and intended to benefit Defendant at Plaintiff's expense.
- 40. As a direct and proximate result of Defendant's unlawful acts, Plaintiff has been, and continues to be, damaged. Plaintiff has suffered economic and reputational injury flowing directly from Defendant's unlawful acts, including reputational injury resulting from false endorsement of Defendant's services and products which deprived Plaintiff of her valuable right to select what endorsements to grant, including and how those endorsements are presented to and perceived by the public, as evidenced by comments on Defendant's Twitter page and elsewhere, all of which directly damage Plaintiff's ability to control and negotiate endorsement agreements and her valuable rights.
- 41. Plaintiff is entitled to recover from Defendant compensatory damages, Defendant's profits resulting from its unlawful conduct, treble damages and reasonable attorney fees and costs in such amounts to be determined at trial.
- 42. Furthermore, Plaintiff has no adequate remedy at law to compensate her fully for the injury caused by Defendant's unlawful acts and which would be caused by any further infringement of Plaintiff's rights. Accordingly, the Court should enjoin Defendant from committing future unlawful acts and infringements as alleged here.

SECOND CLAIM (Violation of New York Civil Rights Law Sections 50 and 51)

43. Plaintiff repeats, realleges, and incorporates by reference the allegations of paragraphs 1 through 33 above as if fully set forth herein.

- 44. Defendant has used Plaintiff's name, picture, image and likeness within the State of New York for advertising purposes or for the purpose of trade without Plaintiff's consent.
- 45. Defendant's use of Plaintiff's name, picture, image and likeness was willful, malicious and in conscious disregard of Plaintiff's rights.
- 46. Defendant's conduct violates Plaintiff's rights under Sections 50 and 51 of the Civil Rights Law of the State of New York.
- 47. As a result of Defendant's unauthorized use of Plaintiff's name, picture, image, and likeness, Plaintiff has been, and continues to be, damaged.
- 48. Defendant received a cease and desist letter from Plaintiff's counsel but continues to intentionally ignore Plaintiff's legal rights and to profit therefrom.
- 49. Defendant has purposefully used Plaintiff's name, picture, image, and likeness in a manner that it knew to be unlawful pursuant to Sections 50 and 51 of the New York Civil Rights Law. Defendant knew it was required to obtain Plaintiff's consent for its use of her name and the Heigl Photograph. Defendant never sought such consent.
- 50. Plaintiff is entitled to recover from Defendant all damages for her injuries sustained by reason of Defendant's unlawful actions, as well as exemplary and punitive damages, under Section 51 of the New York Civil Rights Law in such amounts to be determined at trial.
- 51. Furthermore, Plaintiff has no adequate remedy at law to compensate her fully for the injury caused by Defendant's unlawful acts and which would be caused by any

further infringement of Plaintiff's rights. Accordingly, the Court should enjoin Defendant from committing future unlawful acts and infringements as alleged here.

THIRD CLAIM (Common Law Unfair Competition)

- 52. Plaintiff repeats, realleges, and incorporates by reference the allegations of paragraphs 1 through 33 above as if fully set forth herein.
- 53. Defendant's actions alleged herein constitute unfair competition within the State of New York and in violation of New York law because Defendant acted intentionally to mislead and confuse consumers, or caused a likelihood of consumer confusion, and acted in bad faith.
- 54. Plaintiff carefully monitors and controls the valuable commercial use of her name, picture, image, and likeness.
- 55. Defendant's recent Facebook and Twitter pages prominently feature the Heigl Photograph and Plaintiff's name in a manner that misleads and confuses consumers.
- 56. Defendant acted in bad faith by first misappropriating the Heigl Photograph, then using it stripped of its original news-reporting function to falsely imply that Plaintiff's valuable endorsement rights were granted to Defendant -- even though they were not -- and by using Plaintiff's name in conjunction with at least two advertising messages and multiple links to commercial advertising for Defendant's products and services.
- 57. As a direct and proximate result of Defendant's acts of unfair competition, Plaintiff has been, and continues to be, damaged, and is entitled to recover from Defendant damages in such amount to be determined at trial. Defendant's acts of unfair competition were

willful, malicious and in conscious disregard of Plaintiff's rights, entitling Plaintiff to recover punitive damages.

58. Furthermore, Plaintiff has no adequate remedy at law to compensate her fully for the injury caused by Defendant's unlawful acts and which would be caused by any further infringement of Plaintiff's rights. Accordingly, the Court should enjoin Defendant from committing future unlawful acts and infringements as alleged here.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully demands judgment against Defendant as follows:

- (a) on the <u>First Claim under Section 43(a) of the Lanham Act</u>, awarding Plaintiff (i) compensatory damages in an amount to be determined at trial; (ii) the amount of Defendant's profits resulting from its unlawful conduct; (iii) treble damages as authorized by statute; and (iv) reasonable attorney fees and costs as also authorized by statute;
- (b) on the <u>Second Claim for violation of New York Civil Rights Law Sections 50</u> and 51, awarding Plaintiff (i) damages for her injuries sustained by reason of Plaintiff's unlawful actions; (ii) exemplary and punitive damages; and (iii) reasonable attorney fees and costs;
- (c) on the <u>Third Claim for unfair competition</u>, awarding Plaintiff (i) compensatory damages in an amount to be determined at trial; and (ii) exemplary and punitive damages;
- (d) on <u>each of the First, Second and Third Claims</u>, permanently enjoining Defendant, and its agents, officers, servants, employees, successors and assigns and all others acting in concert or privity with Defendant, from using, imitating, or copying Plaintiff's name, picture, image, or likeness in connection with any promotion, advertisement, display, sale, or

circulation of any services or products, including commercial advertising use, whether express or implied, on the Internet or social media in any form; and

(e) awarding such other and further relief as this Court deems just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all issues triable by right to a jury.

Dated: New York, New York April 9, 2014

By:

Peter L. Haviland (Pro hac vice motion to be

submitted)
Corey Field
Scott M. Himes

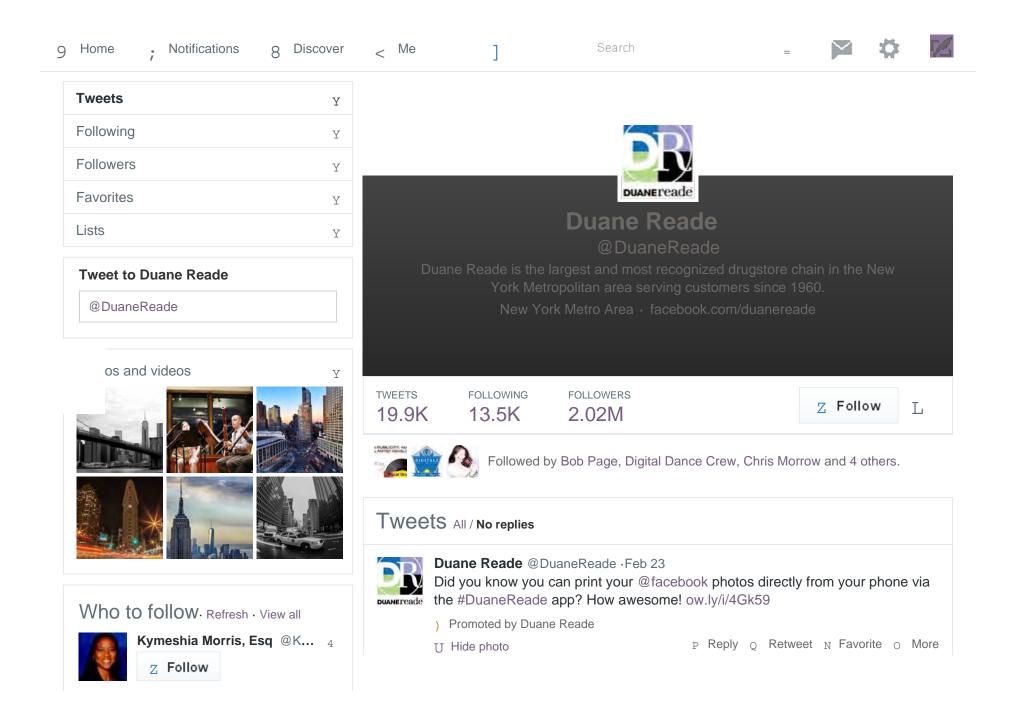
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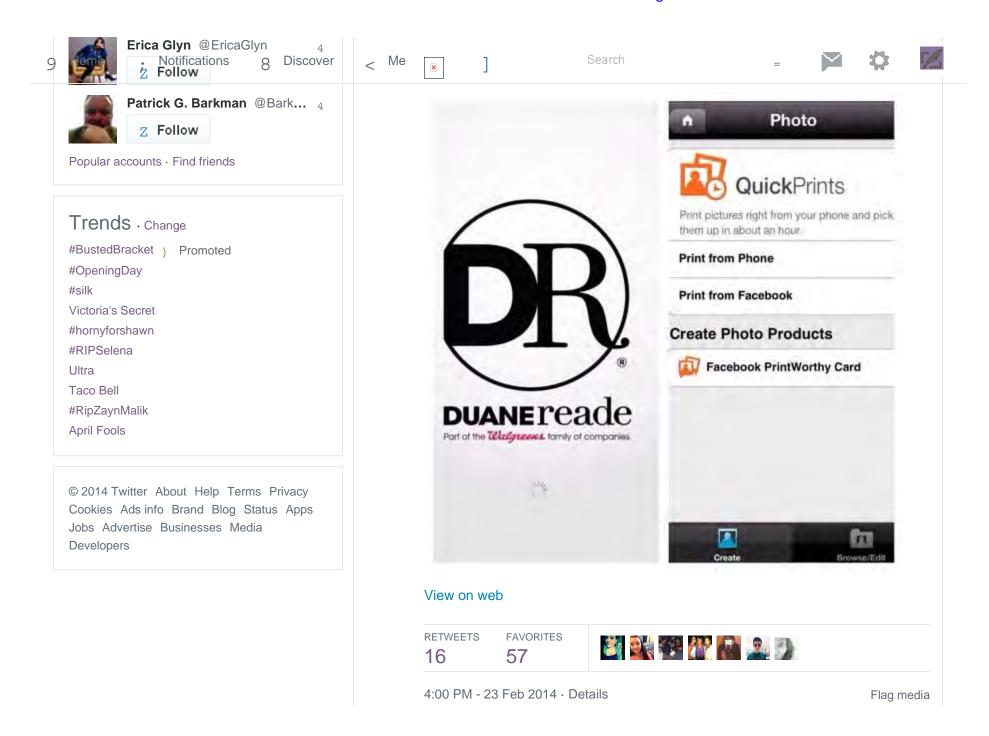
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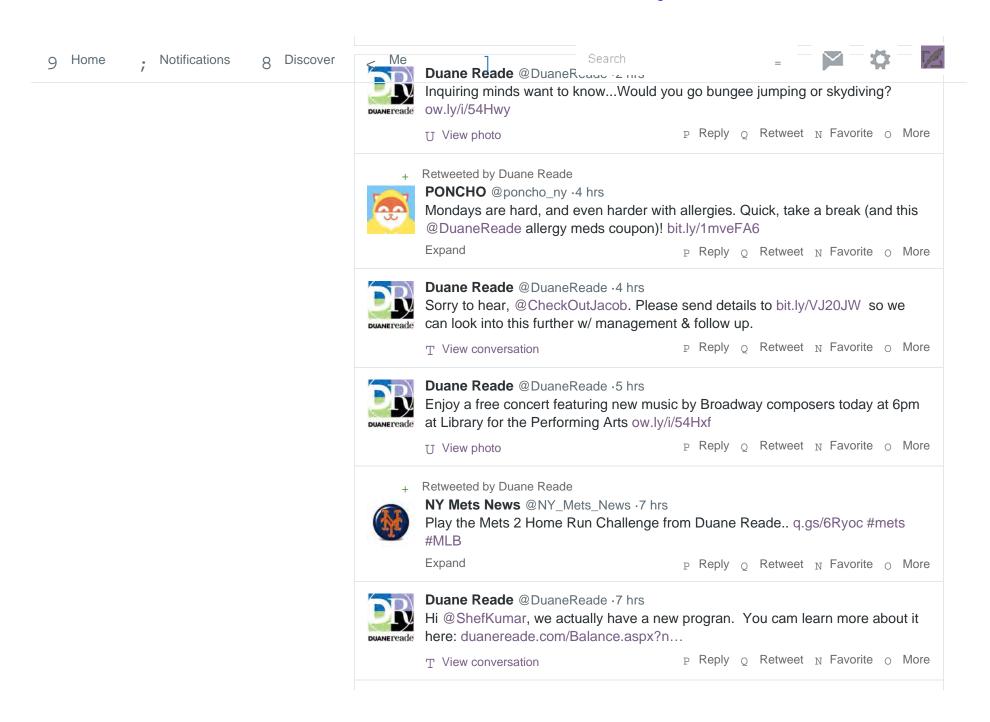
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Attorneys for Plaintiff Katherine Heigl

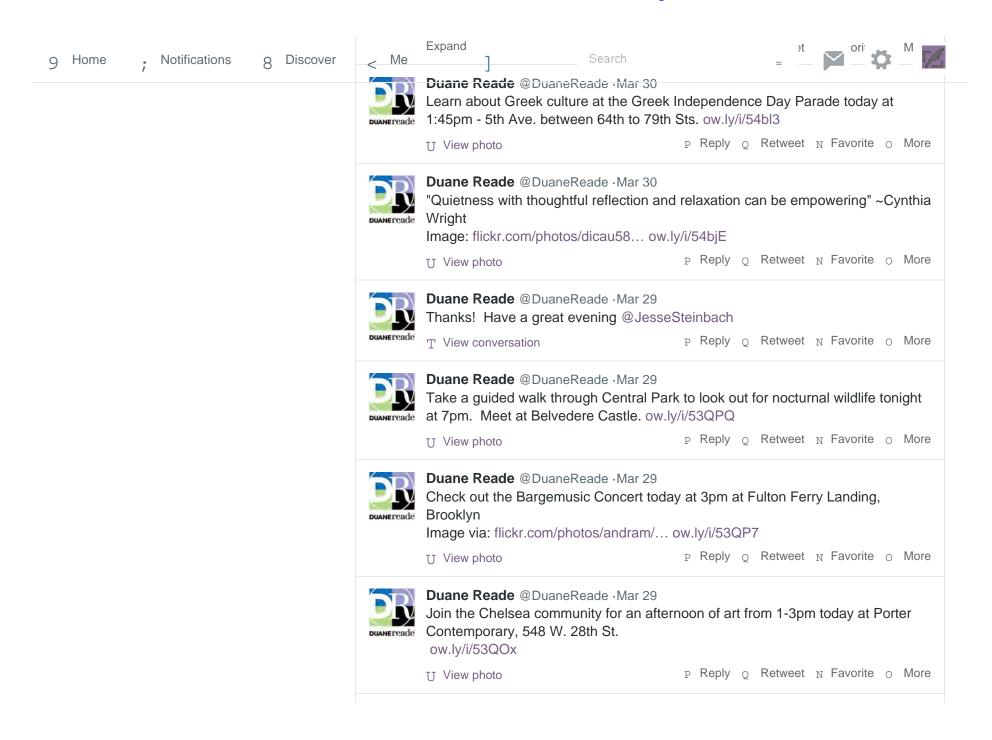
Exhibit A

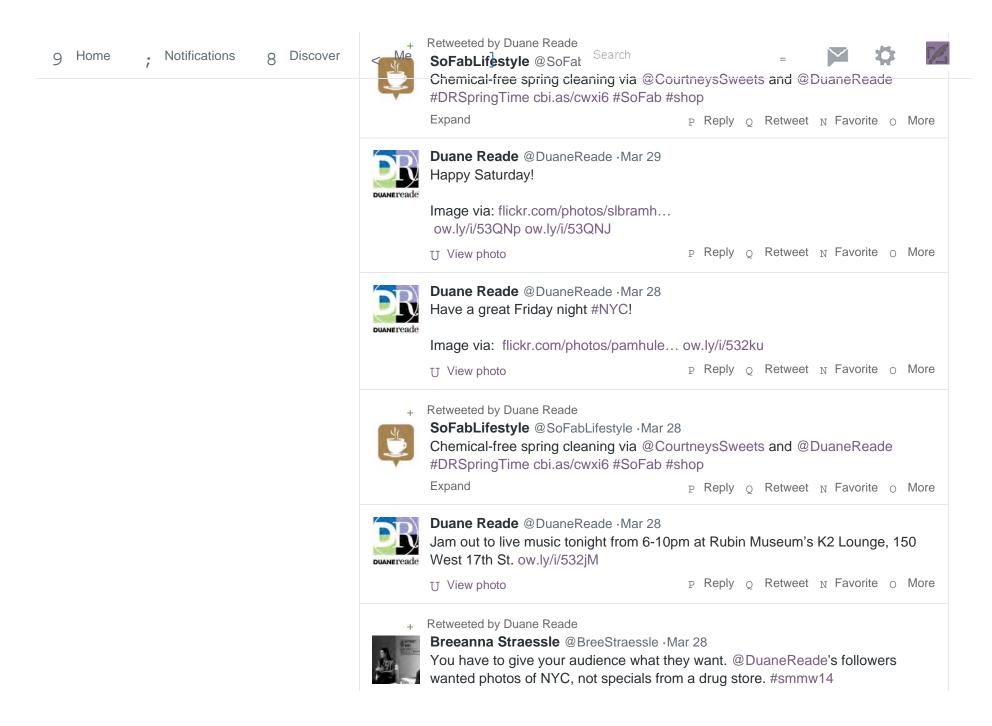


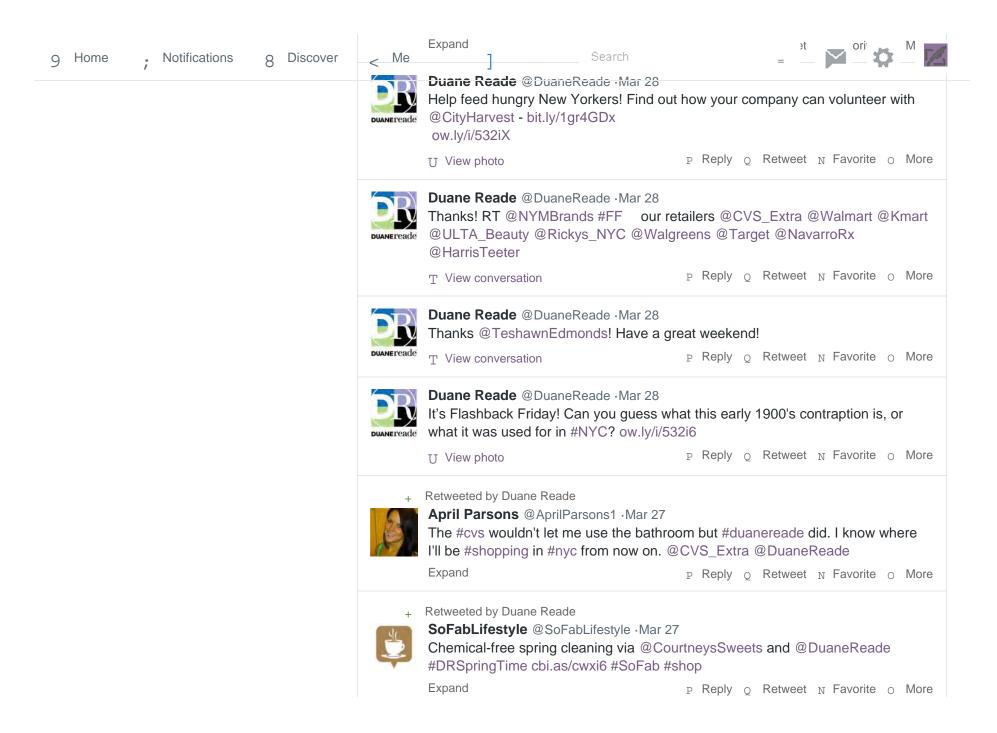




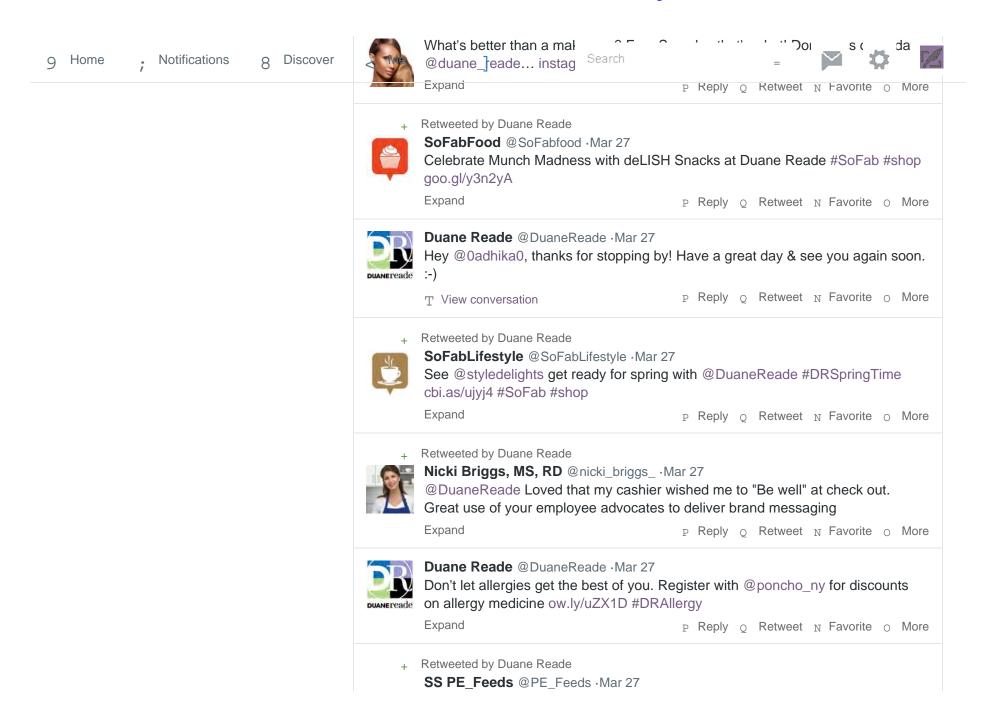
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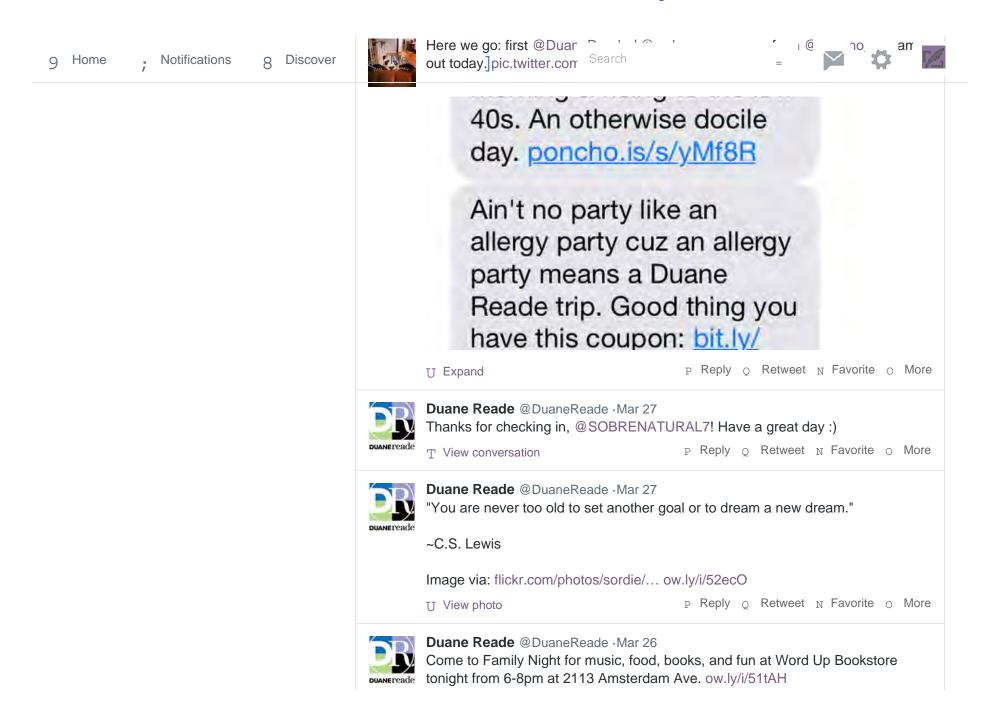


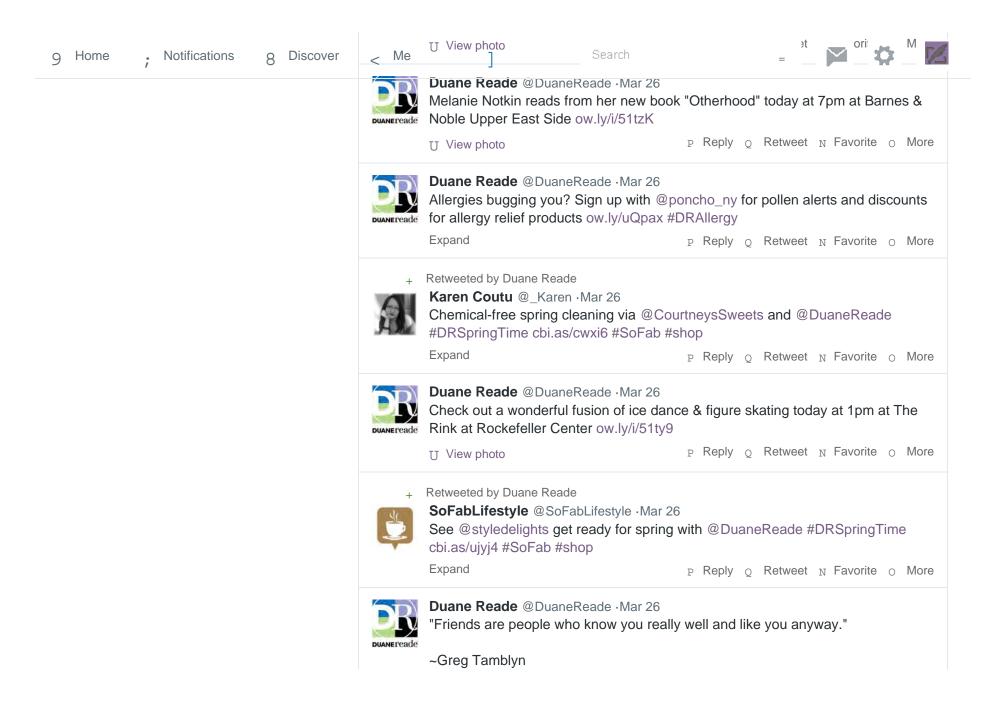


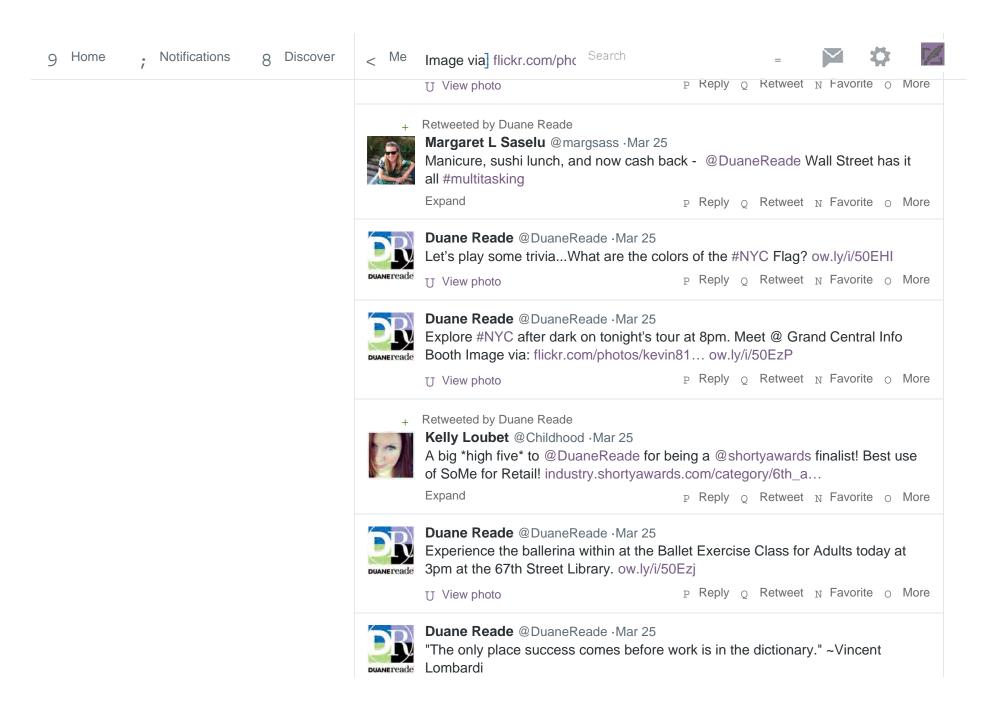


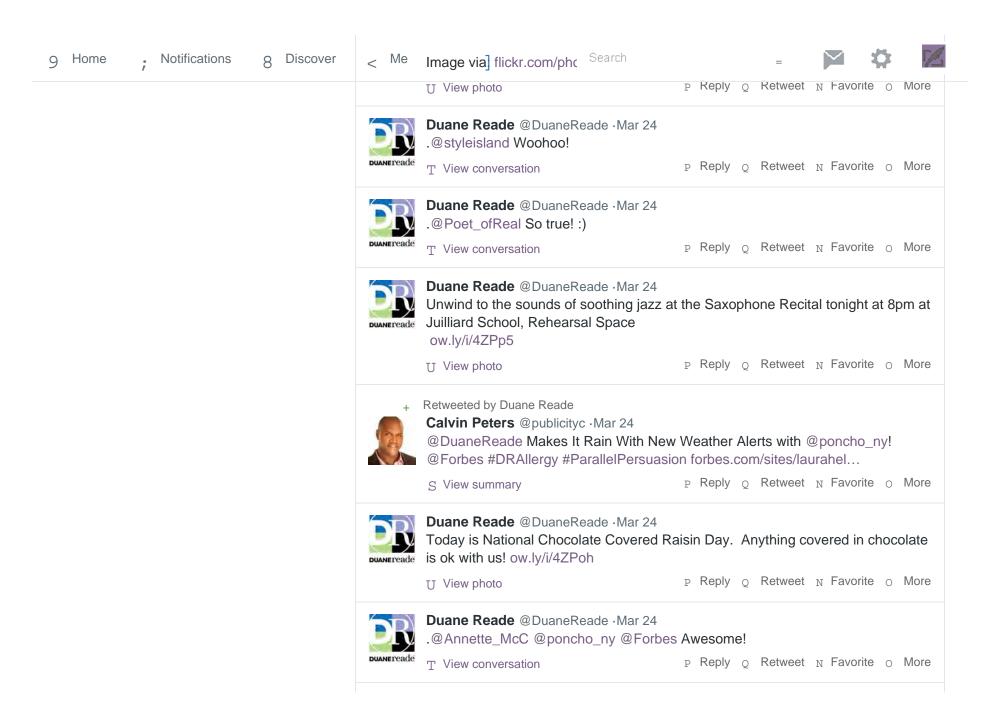
Home Notifications Discover Duane Reade @DuaneR Get ready for spring! Find all of the latest spring beauty trends at your nearest #DuaneReade LOOK... instagram.com/p/mECBtKhKc5/ Expand P Reply Q Retweet N Favorite O More Duane Reade @DuaneReade ·Mar 27 March is #WomensHistoryMonth, a time for celebrating the diverse and historic accomplishments of women. ow.ly/i/52edF P Reply Q Retweet N Favorite O More U View photo Duane Reade @DuaneReade ·Mar 27 Always good to see you, @TeshawnEdmonds :) Thanks for stopping by! DUANETeade ¬ View conversation P Reply Q Retweet N Favorite O More Duane Reade @DuaneReade ·Mar 27 Marvel at spectacular arrangements of flowers at Macy's Flower Show all day today at Macy's Herald Square. ow.ly/i/52ef6 P Reply O Retweet N Favorite O More TJ View photo Retweeted by Duane Reade Perfect Bacon Bowl @PerfBaconBowl ·Mar 27 Yum! #NYC: Where's your favorite spot to grab a quick #lunch? Be sure to check BACON out our friends @DuaneReade. They love #BACON! #DRLunch Expand P Reply O Retweet N Favorite O More Retweeted by Duane Reade PONCHO @poncho_ny ·Mar 27 Did you use your @DuaneReade allergy coupon today? How did it go? I want to know everything. Expand P Reply O Retweet N Favorite O More Retweeted by Duane Reade Iman Abdulmajid @The_Real_IMAN ·Mar 27



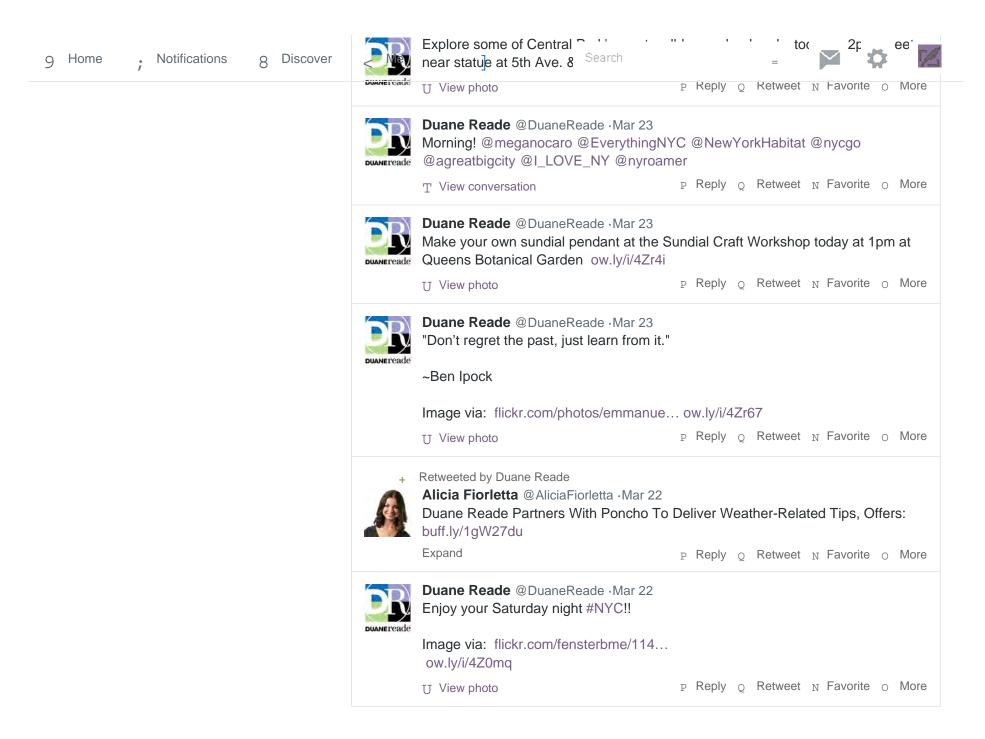


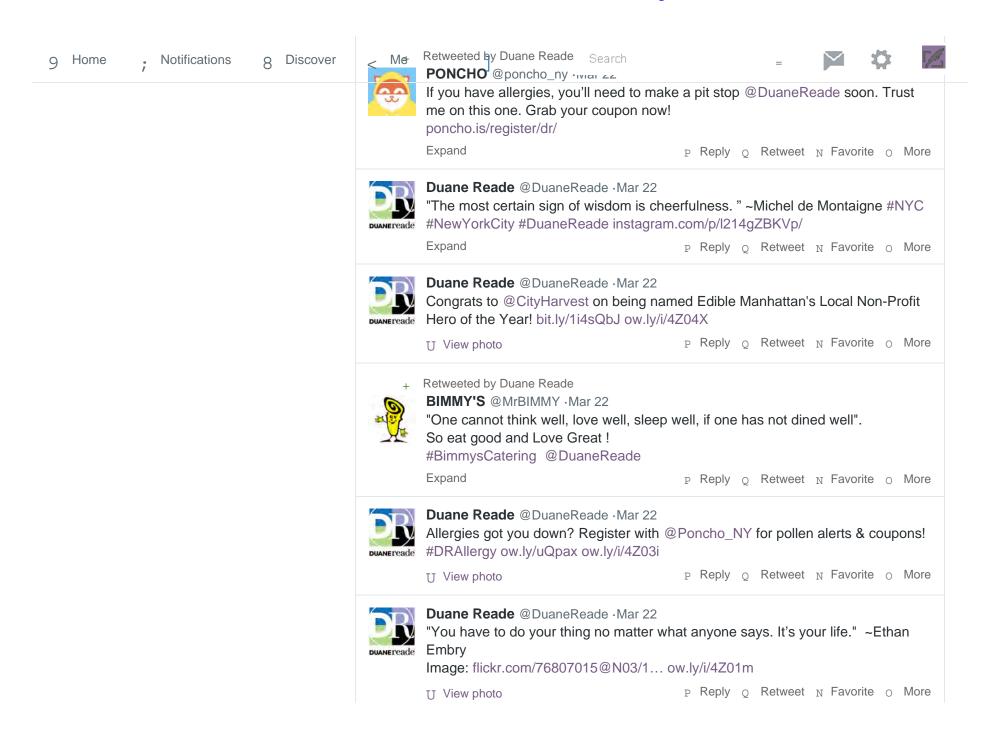


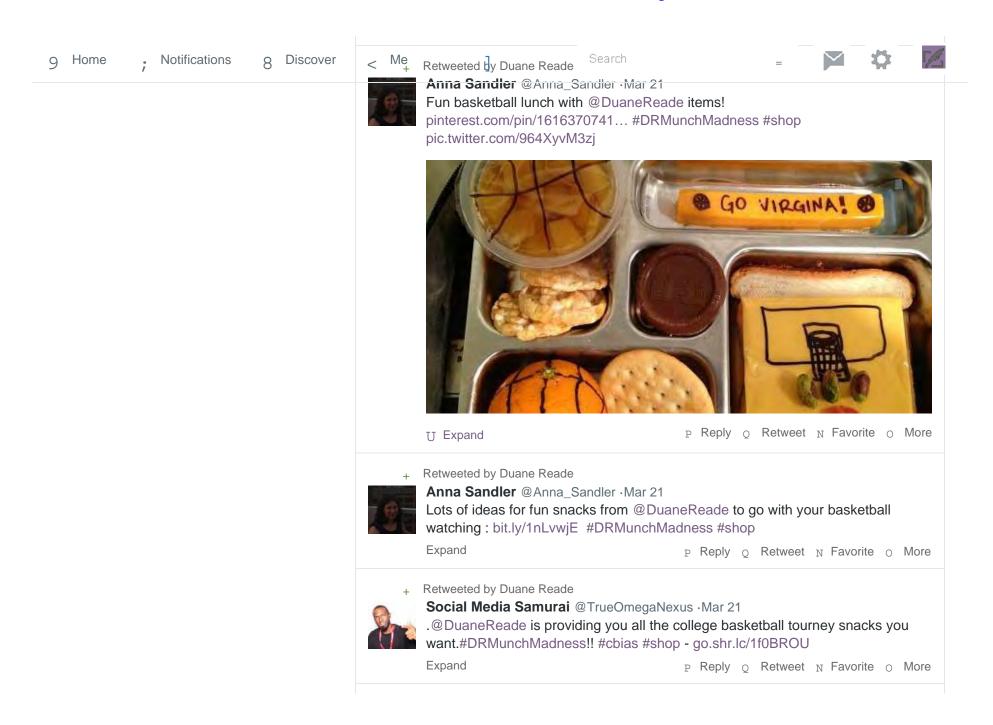


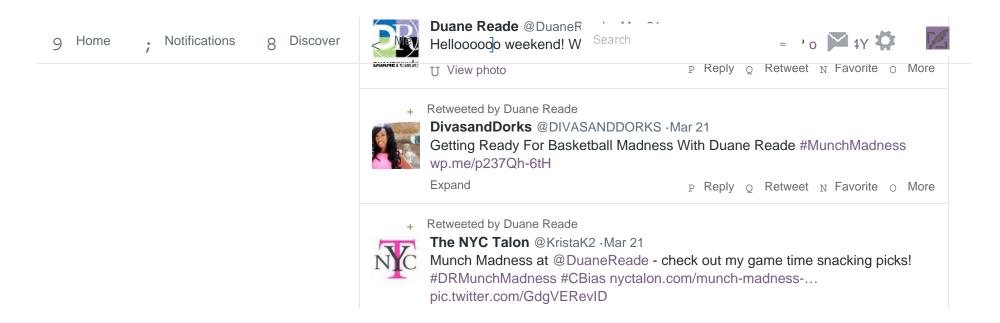


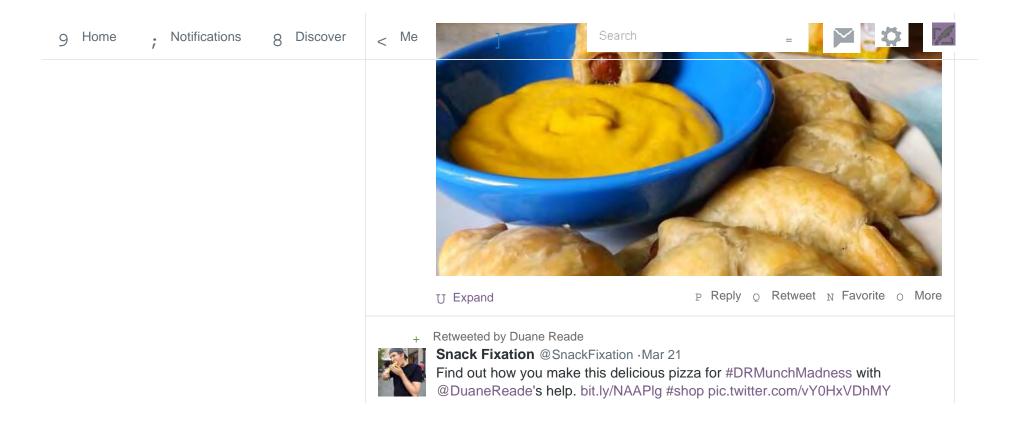
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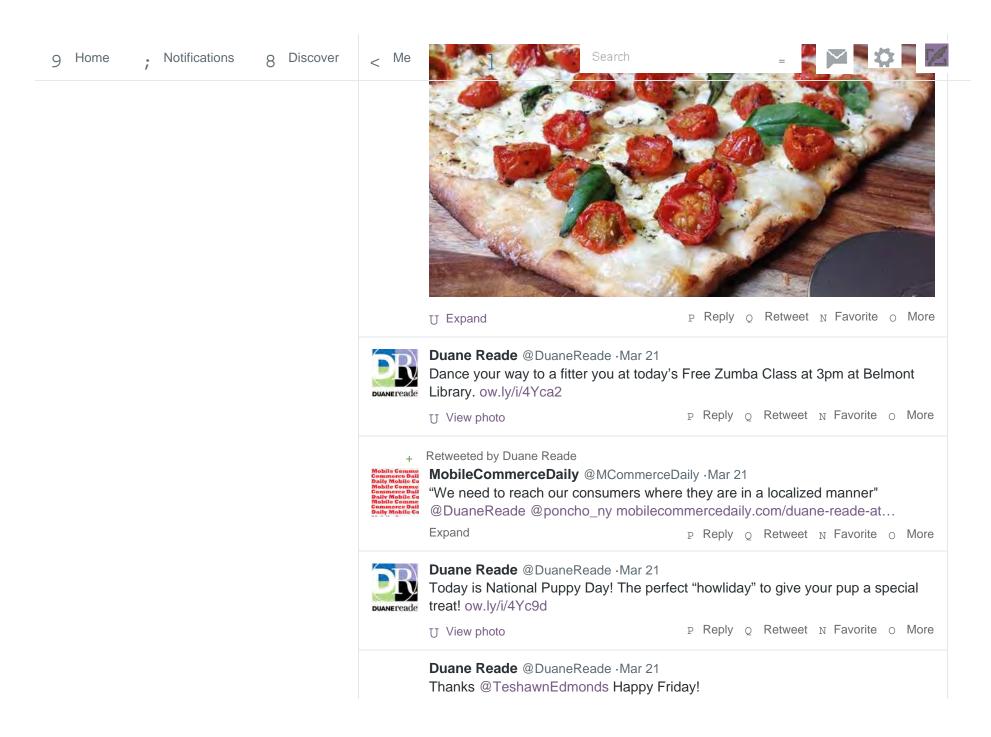


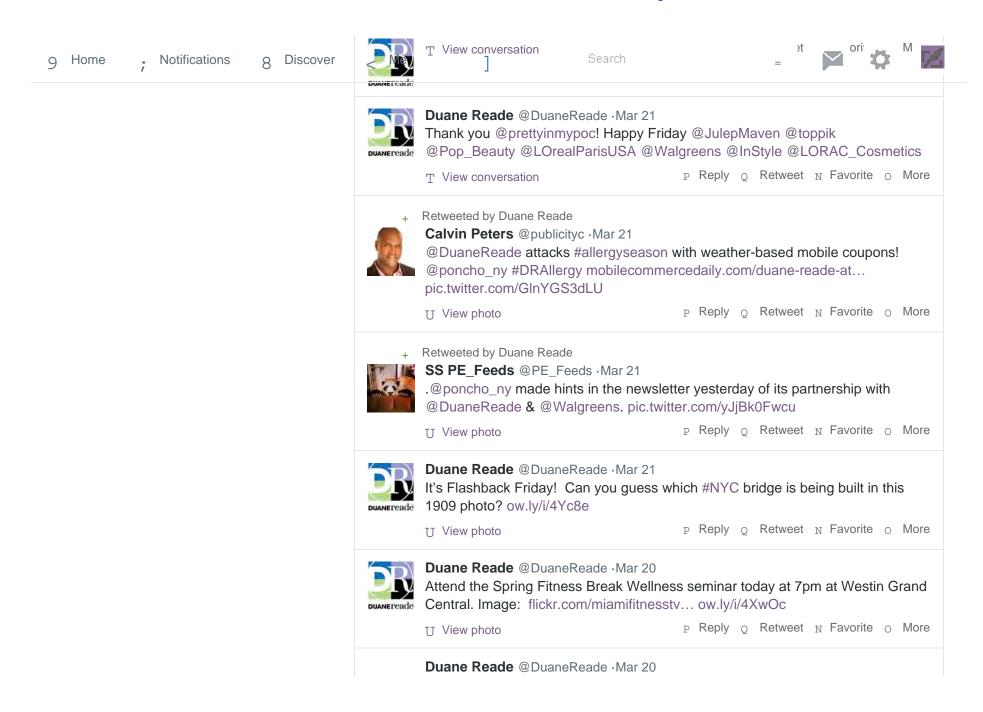


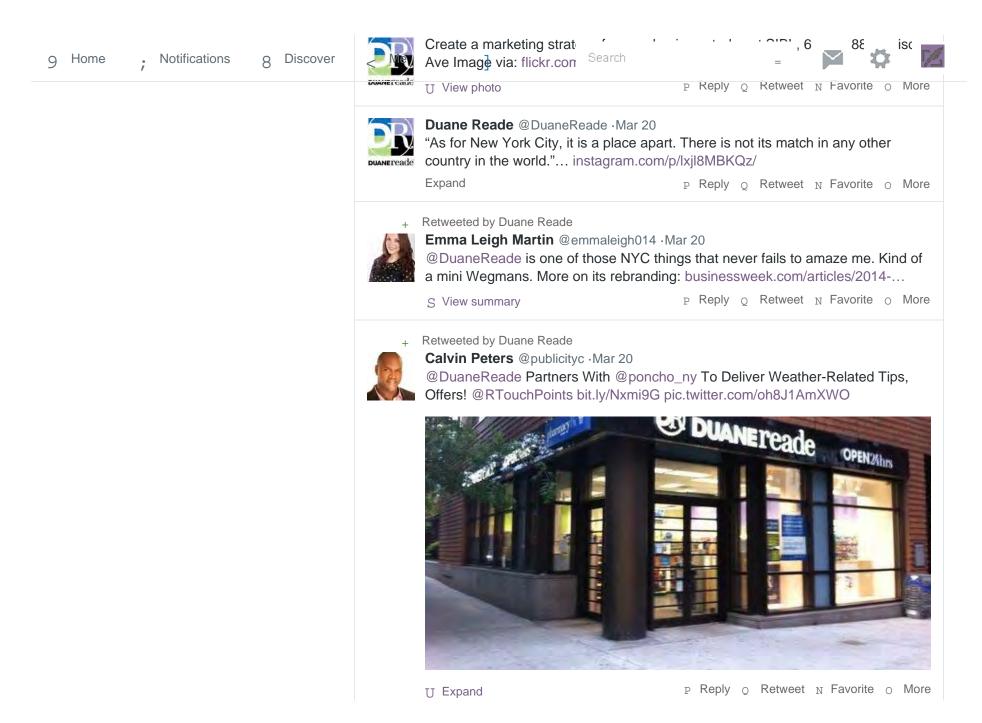


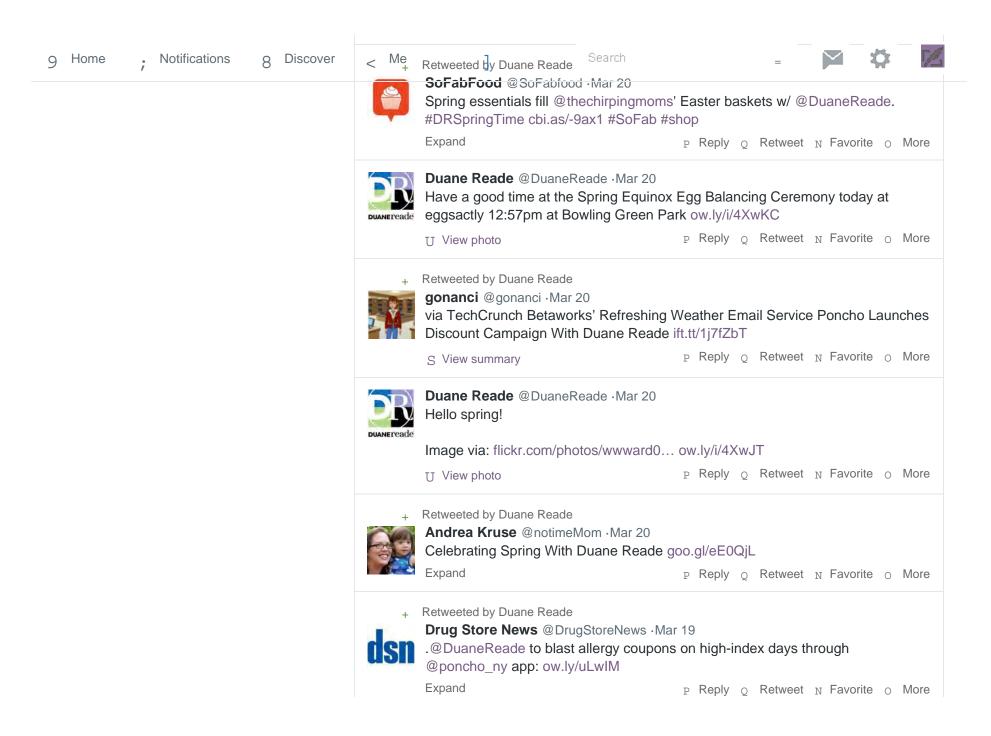


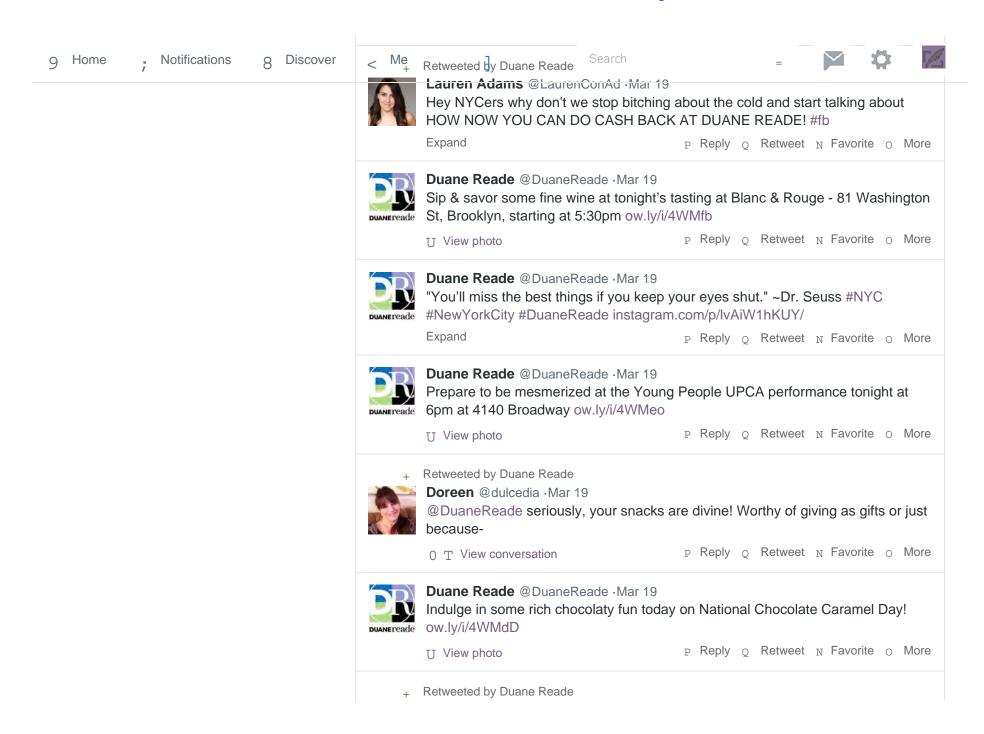




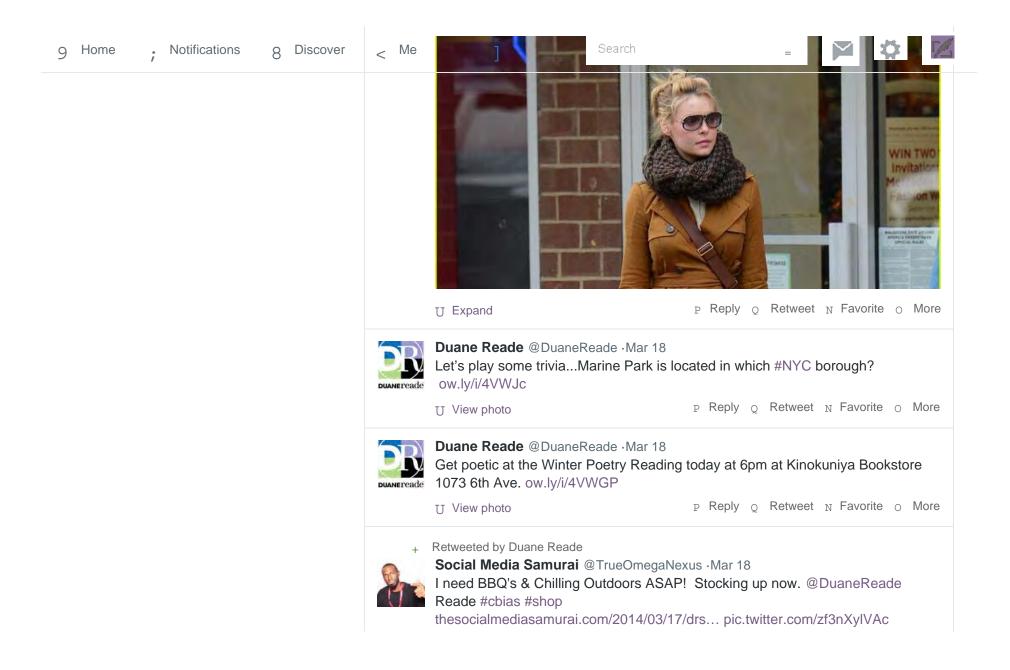


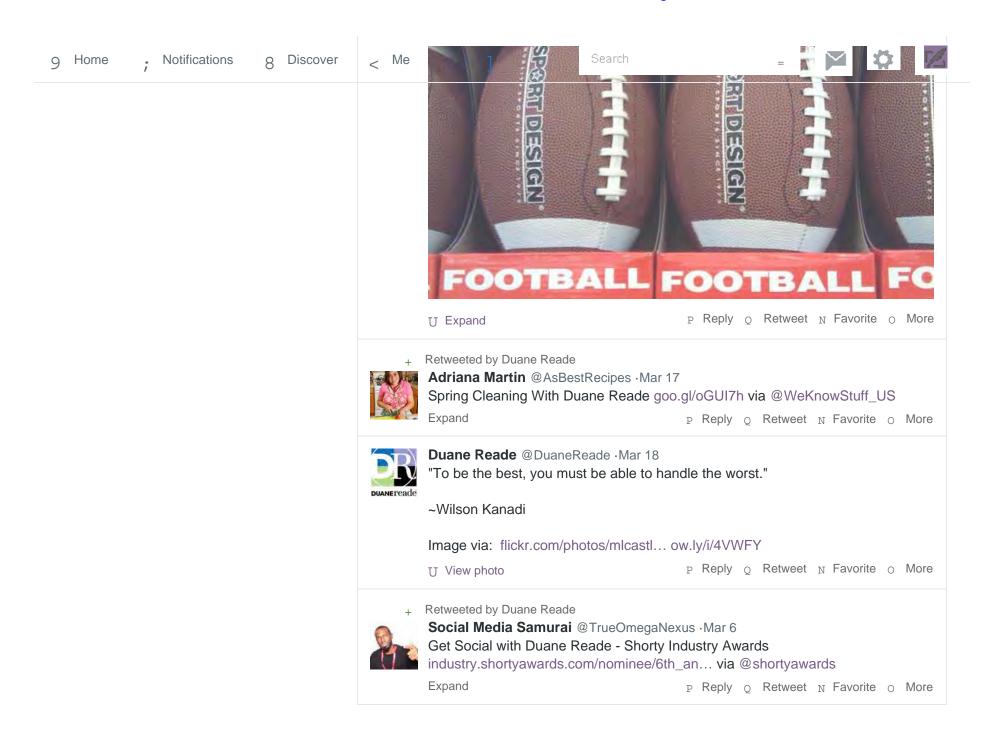




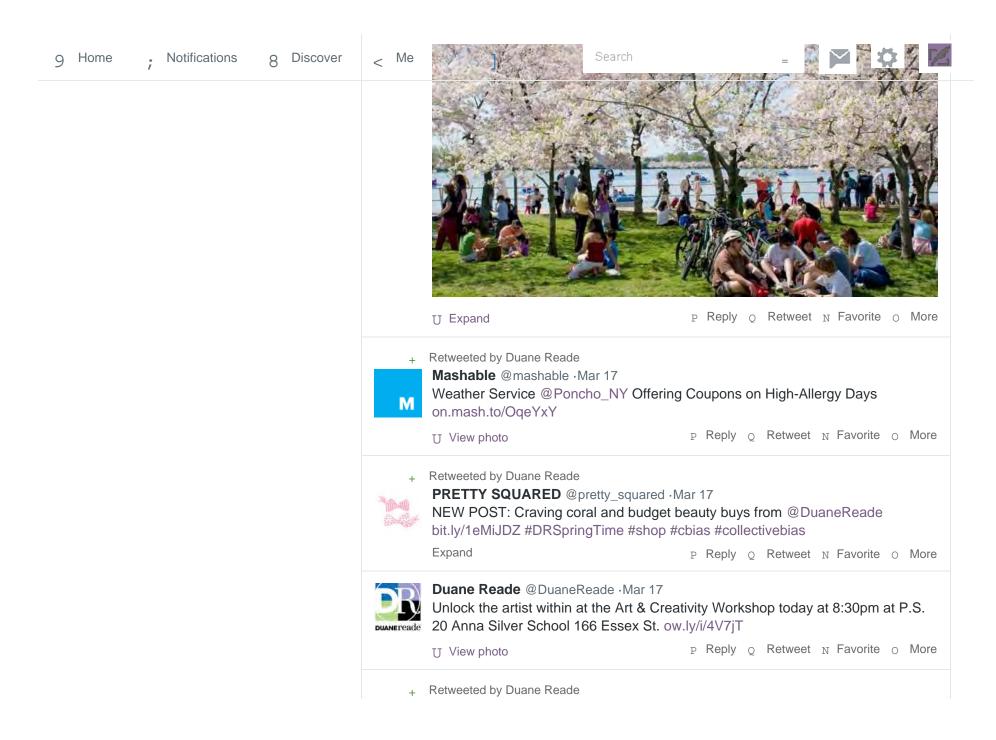


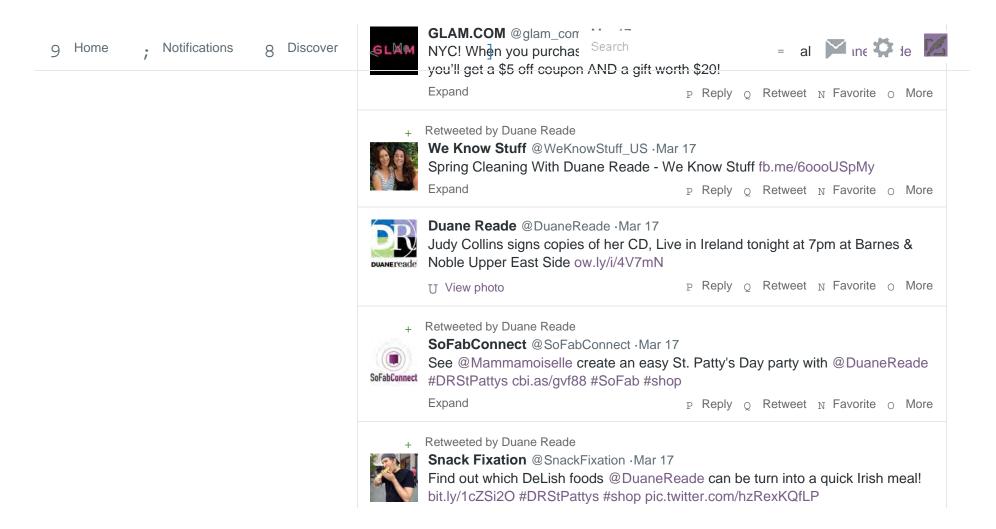
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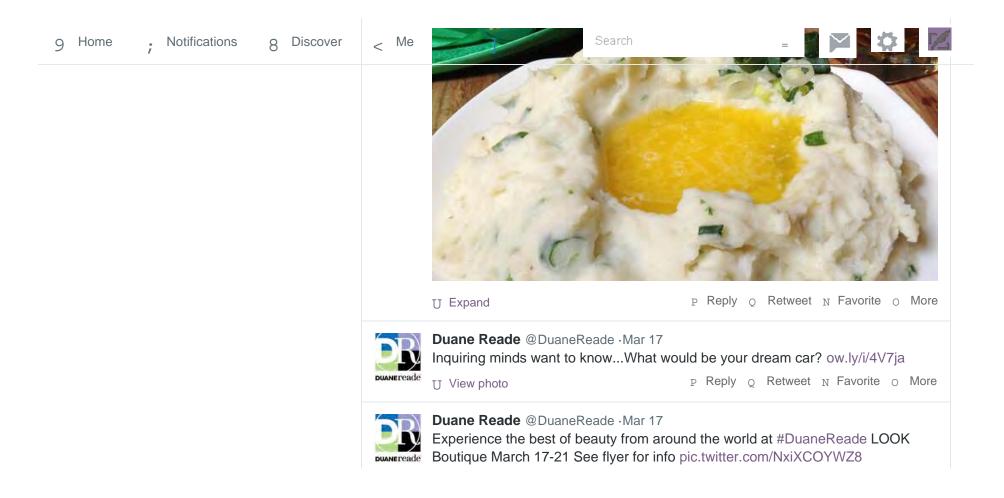


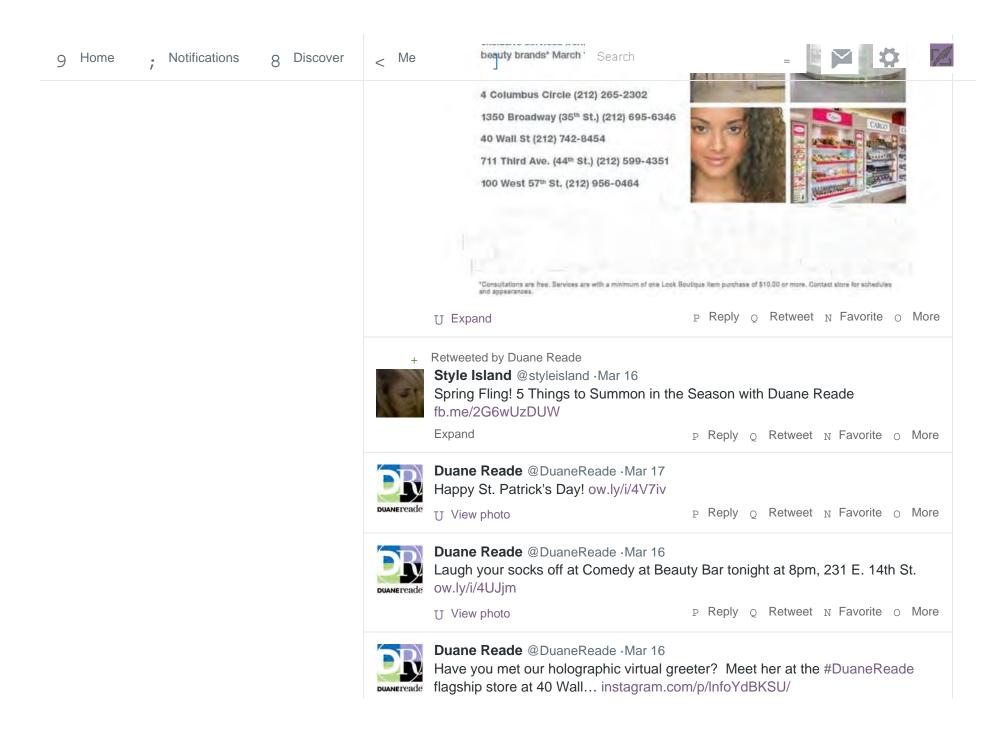


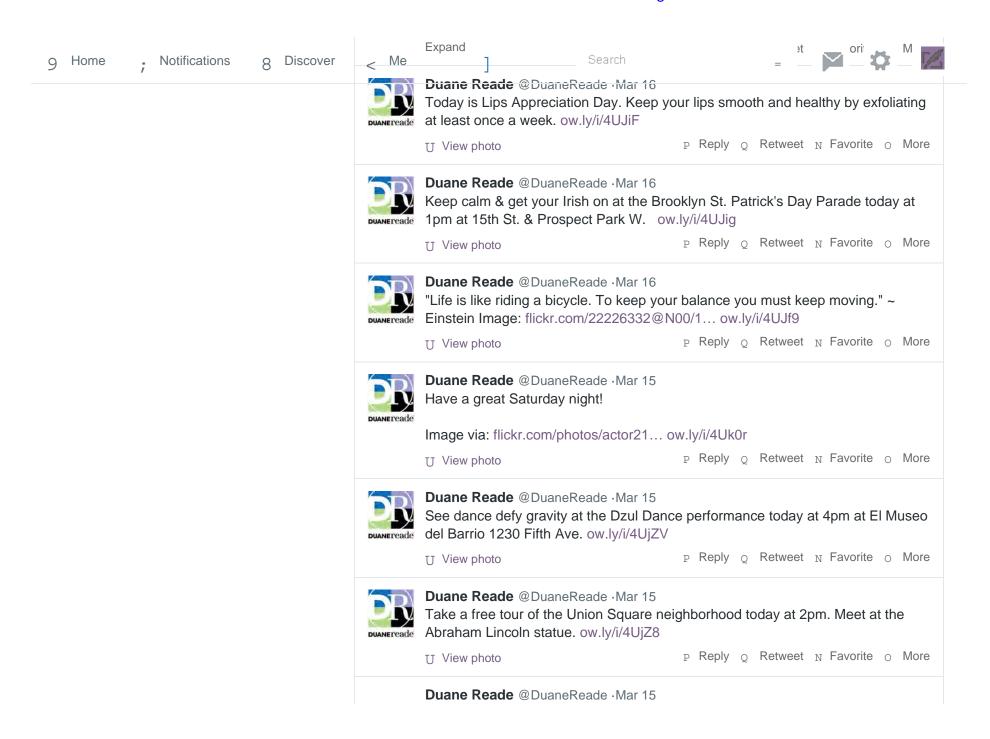


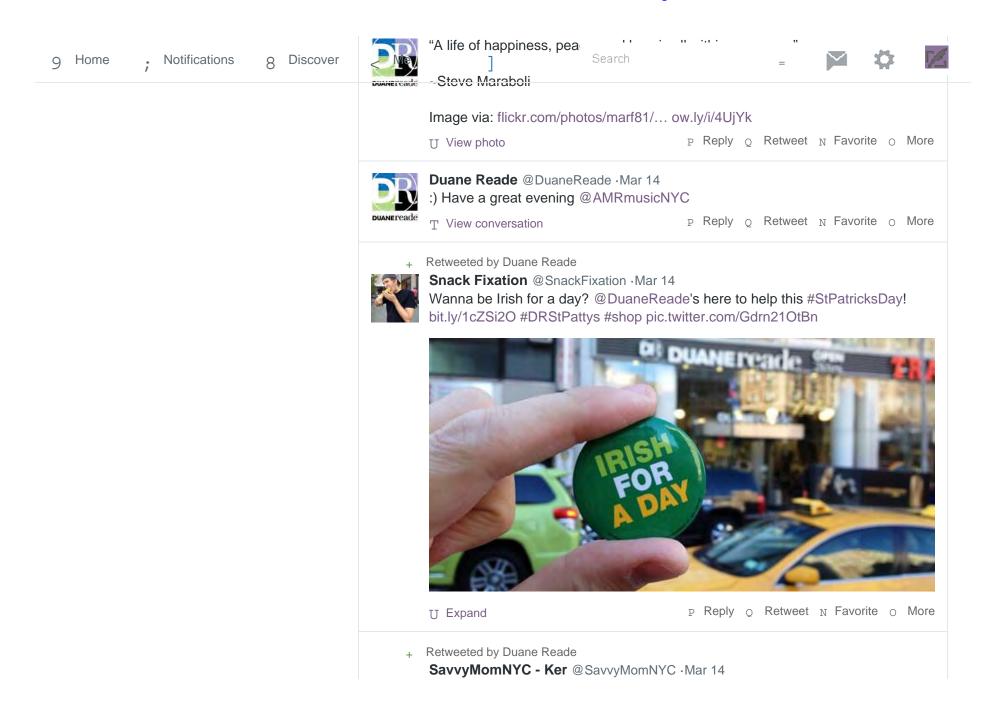


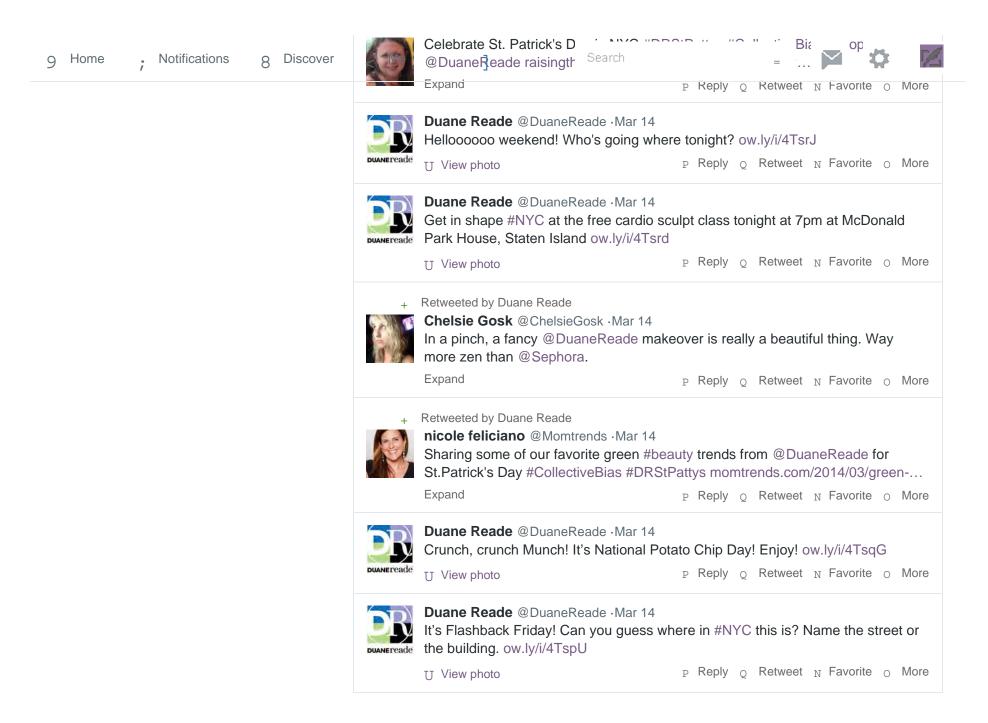












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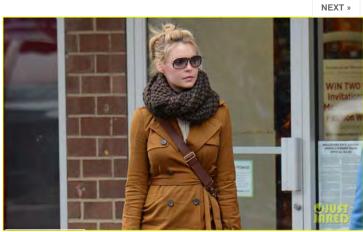




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Katherine Heigl Signs with WME **After Leaving Creative Artists Agency**

Heigl Signs with WME After Leaving Creative Artists Agency





About this photo set: Katherine Heigl steps out with her mom Nancy to do some shopping at Duane Reade on Sunday afternoon (March 16) in New York City. It was just announced that the ... Read More Here

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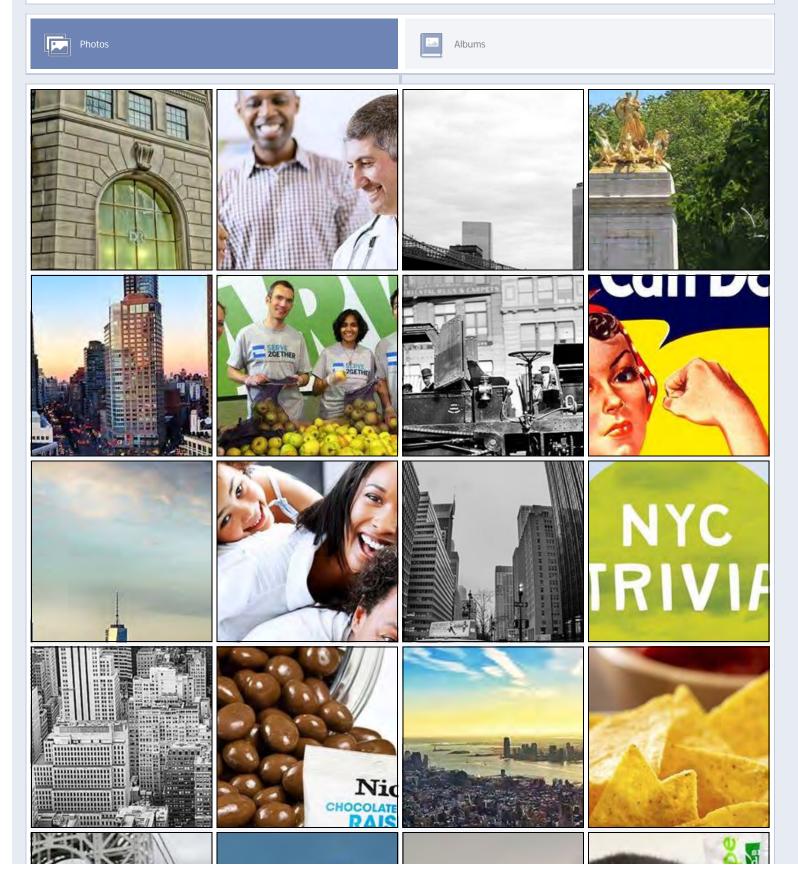
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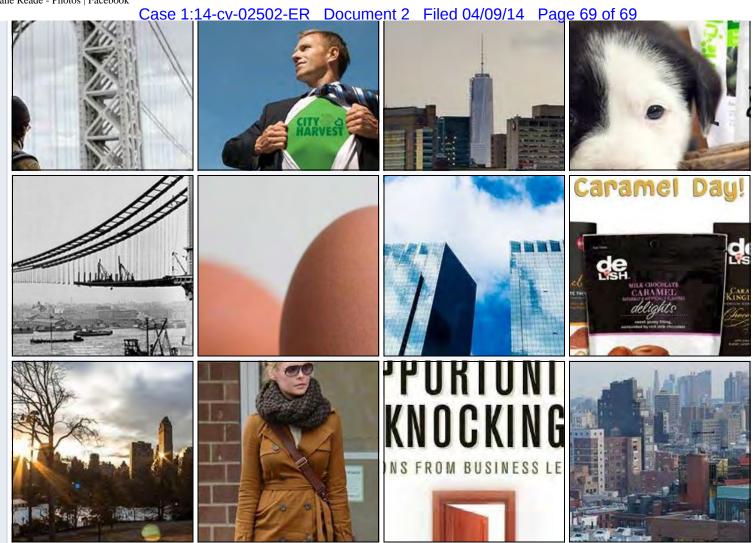


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